

**REMARKS**

Reconsideration of this Application as pending in this RCE is respectfully requested. This LETTER COMMENTING UPON ADVISORY ACTION is filed in response to the Advisory Action mailed April 11, 2007 (the "Advisory Action"). Claims 1-5 and 15-26 and 28-37 are pending in the application, with claims 1, 15, and 32 being the independent claims. Based on these Remarks, Applicant respectfully requests that the Examiner reconsider all prior objections and rejections and that they be withdrawn. It is submitted that all pending claims are in a condition for allowance

***Prior Rejections under 35 U.S. C. § 112, second paragraph***

It is believed that Applicant's amended claims as set forth in the Amendment and Reply After Final Rejection have rendered moot any prior rejection of pending claims under 35 U.S.C. § 112, second paragraph respectively, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicant regards as the invention. In this regard the structure of claim 27 was previously stated to contradict the limitation of claim 1 setting forth the gripping number as being recessed within the spout. Claim 28, being dependent upon claim 27 was stated suffer the same infirmity. With entry of Applicant's last amendment, claim 27 has been canceled and claim 28 is now dependent upon independent claim 1 thereby rendering the rejection thereof moot.

***Prior Rejections under 35 U.S. C. § 103*****Claims 1-5 and 15-26 and 28-37**

The Advisory Action maintained the rejected claims 1, 3, 5, 26, 29, 31-32, 34 and 36-37 under 35 U.S.C. § 103 as being unpatentable over U.S. Patent No. 5,839,627 to Hicks et al. ("Hicks") in view of the cited reference of U.S. Patent No. 4,756,443 to Murayama.

The Examiner previously acknowledged that the Hicks fitment "does not expressly disclose a semi-circular member having first and second ends with the second end unconnected to the frangible membrane as called for in Applicant's independent claim 1." Yet, Hickes is cited for its column 5 lines 4-6 statement that a gripping member can have other desired shapes including a "tab or handle or any other protrusion suitable for grasping".

The cited reference of Murayama is applied for a teaching that "it is known to provide a gripping member as a ring (49) or a semi-circular (35) tab member". The present rejection is therefor based on the proposition that that it would have been obvious to one of ordinary skill in the art to form the Hicks gripping member in a semi-circular (claim 1, 32) or helically (claim 34) shape having first and second ends with the second end unconnected to the frangible membrane as taught by Murayama because a mere change in the shape of a component, is generally recognized as being within the level of ordinary skill in the art.as it provides a gripping member of known alternative configuration. With respect to claims 32 and 26, the "design choice" is optimization to provide the semicircular member with an extension of approximately 180° and 270° repsectively.

The Advisory Action states in part that:

"The patent to Murayama is applied for its teaching of a semi-circular pull tab. The patent to Hicks is modified in view of Murayama to illustrate the pull tab can be semi-circular since Hicks teaches other shapes to the illustrated pull tab except for semi-circular. The other structure of the prior art references, unless otherwise stated in the rejection, are not included in the rejection."

Applicant again notes that no singular reference has been cited as anticipating Applicant's claimed invention. Unpatentability for anticipation under 35 U.S.C. § 102(b) requires that all of the elements and limitations of the claim be found within a single prior art reference. Carella v. Starlight Archery and Pro Line Co., 804 F.2d 135, 138, 231 USPQ 644, 646 (Fed.Cir.1986);

RCA Corp. v. Applied Digital Data Systems, Inc., 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed.Cir.1984).

Applicant respectfully traverses the foregoing rejections of claims under 35 U.S.C. § 103(a) as the same may be attempted to be applied to Applicant's independent claims 1 and 32 upon which all remaining claims directly or indirectly depend thereon.

Applicant respectfully submits that the cited and applied Hicks and Murayama references herein (1) are not properly combinable in the manner asserted in the present Advisory Action and (2) even if the combination were attempted, the same does not reconstruct Applicant's invention as claimed in independent claims 1 and 32.

#### **No Recreation of Applicant's Claimed Invention.**

Addressing the latter argument first - that the attempted Hicks and Murayama combination does not reconstruct Applicant's claimed invention - it is noted that both independent claims 1 and 32 in part define a fitment comprising a gripping member adapted to facilitate removal of the frangible membrane from the spout, **the gripping member including a semicircular member having first and second terminal ends, the first end being connected to the frangible membrane adjacent the line of weakness, and the second end being remotely located from the first end and unconnected to the frangible membrane**; wherein the frangible membrane and the gripping member are monolithically formed **and the semicircular member is either recessed within the spout (claim 1) or extends at least approximately 180° (claim 32).**

Applicant respectfully submits that the attempted combination of Hicks and Murayama do not reconstruct the bold print portions of the independent claims set forth above.

While the Hicks patent discloses column 5 lines 4-6 at that **pull device 30** "may be a ring or tab or handle or any other protrusion suitable for grasping by the user", the Hicks patent fails

to disclose that its pull device may be **semicircular**. The Examiner acknowledges that the Hicks patent fails to teach or suggest "a semi-circular member".

Nor does the Hicks patent teach or suggest such a pull device having **an open configuration with an inner and outer diameter**. Instead, Hicks discloses a tab 30 attached to a top surface 28 of an inner membrane seal 20. Tab 30 disclosed by Hicks is depicted as having a closed ring-shape in all the figures. The closed ring shape disclosed by Hicks is distinct from an open semicircle shape both in appearance and in function, both when resting and when being pulled by a user. Indeed, Hicks teaches at Column 5, lines 25-31, that the inner membrane seal 20 "may be removed from the inside of the spout by **either pulling the tab 30 upwardly or pushing it downwardly** (in a direction opposite to arrow 21) to produce an aperture which was previously occupied by the inner membrane seal 20" {bold print emphasis added}. To operate downwardly the pull tab 30 of Hicks is as depicted, namely of **a closed configuration**. Hicks fails to disclose an open configuration.

Nor does Hicks teach or suggest "**a semi-circular member having first and second terminal ends**" as in the fitment of the present invention called for by claims 1 and 32.

Nor does Hicks teach or suggest "**the first end being connected to the frangible membrane adjacent the line of weakness, and the second end being remotely located from the first end and unconnected to the frangible membrane**".

It is respectfully submitted that the foregoing aspects of the present invention not taught by Hicks are not supplied by Murayama via a gripping member as a ring (49) or a semi-circular (35) tab member. Modifying Hicks in view of Murayama as applied does not convert the Hick's pull tab 30 to be "semi-circular".

Murayama is directed to a pressure-packing container comprising an impervious container body having an internally recessed upper edge, and an easy-to-open closure cap

composed of a rigid outer closure member having an annular rim, a resilient inner closure member joined with the underside of the outer closure member, and a sheet of impervious film bonded with the inner closure member. To close the container, an inner peripheral wall of the rim is plastically deformed to force a portion of the inner closure member to flex into a groove in the upper edge, with an outer edge of the impervious film sheet sandwiched between the deformed inner closure member and the grooved upper edge, thereby providing a hermetic seal strong enough to withstand the inside pressure of the container.

FIG. 1 of Murayama is a plan view of a closure cap 11 of its pressure-packaging container.

With respect to the asserted semi-circular pull tab member 35, Murayama teaches:

"As shown in FIG. 1, the closure cap 11 further includes a **pull tab 35** disposed on an outer obverse side of the outer closure member 21 for detaching the closure cap 11 from the container body 10. **The pull tab 35 is integrally connected with an annular strips 36 disposed in the recessed intermediate portion 25 of the outer closure member 21. The annular strip 36 in turn is integrally connected with the resilient inner closure member 22 by means of a plurality of connectors 37** (FIG. 4) extending through the respective apertures 28 and the through-hole 27. The connector 37a extending through the through-hole 27 is thicker than the other connectors 37 and hence is stronger than the latter. **The pull tab 35, the strip 36 and the connectors 37, 37a are composed of the same material as the inner closure member 22** and they are formed simultaneously with the formation of the molded inner closure member 22."... {Column 4, lines 33-49, bold print emphasis added}

"To open the container of FIG. 5, **the pull tab 35 is gripped by the user's fingers and pulled upwardly away from the closure cap 11 to thereby forcibly separate the strip 36 from the successive connectors 37. Since the last connector 37a is thicker than the remainder 37 and hence withstands the pulling force, the pull tab 35 is still in integral connection with the inner closure member 22. As the pull tab 35 is further pulled, the outer closure member 21 is separated from the inner closure member 22, followed by detachment of the inner closure member 22 from the upper edge 15 of the container body 10. In this instance, the closure cap 11 is snapped out from the container body 10 under the force of the pressurized gas in the container. The upper edge 15 of the container body 10 is free from damage and hence is reusable after cleaning.** {Column 5, lines 43-58, bold print emphasis added}

The Murayama pull tab 35 **thus encompasses a portion which connects with the annular strip 36 – a portion which is inconsistent with the total pull tab 35 being "semicircular"**. Specifically, FIG. 1. illustrates the pull tab 35 as having a generally linear proximal portion connected to the annular strip 36 and an abbreviated flared free end apparently having a mildly acuate contour. As an integral whole, the pull tab 35 distinctly **not "semicircular"**.

The Advisory Action does not comment on the above distinctions. The above quoted specification of Murayama – as well as Fig. 1 – confirms that the "pull tab 35" includes the portion that connects to the annular strip 36 – a portion that is **generally linear both at its proximal connection to the annular strip 36 and its distal connection to an abbreviated flared free end.**

Respectfully, the pull tab 35 of Murayama is not semi-circular. It is more of a L-shaped leg having a downwardly flared "foot" portion of the leg.

Moreover, the gripping surface to be gripped by a user's fingers is expressly stated to be "the pull tab 35" **inclusive of its generally linear proximal portion connected to the annular strip 36.**

The Advisory Action does not comment on the above distinction.

With respect to the Murayama ring (49), FIG. 6 of Murayama is a plan view of a modified closure cap 41. At Column 6 lines 13-31 Murayama teaches:

"The closure cap 41 of the foregoing construction is attached to the upper edge 15 of the container body 10 in the same manner as the closure cap 11 of FIG. 1 has done, therefore, a description is not necessary. **When the closure cap 41 is to be detached from the container body 10, the flap 46 is lifted up to move a portion of the rim 44 upwardly away from the corresponding slit grip portion 44 of the inner closure member 42. As the flap 46 is further lifted, the inner closure member 42 and the impervious film sheet 48 are brought out of sealing engagement with the grooved upper edge 15 of the container body 10. In this instance, a pressurized gas leaks from the container through the slits 47. A further upward movement of the flap 46 necessarily causes detachment of the**

**closure cap 41 from the container body 10. Alternately, it is possible to open the container by pulling a pull tab 49 on the closure cap 41, in advance to the lifting of the flap 46." {bold print emphasis added}**

Thus, usage of the pull tab 49 is an alternate means to open the container than that of flap 46. Employment of this alternative means still entails pulling the pull-tab 49 in like manner as in the pull tab 35 to accomplish the alternate opening with like structure as in the earlier closure cap 11. The Murayama pull tab 49 **also encompasses a portion which connects with the annular strip 36 – a portion which is inconsistent with the total pull tab 49 being "semicircular".** FIG. 6. illustrates the pull tab 49 as having a generally linear proximal portion connected to the annular strip 36. As an integral whole, the pull tab 49 is distinctly not "semicircular".

The Advisory Action does not comment on the above distinction.

It appears that in order to attempt to recreate Applicant's claimed semicircular member of independent claims 1 and 32, Hicks is modified by Murayama **by dissecting out the linear proximal portion of the pull tab 35 or 49 that is connected with the annular strip 36 which in turn is integrally connected with and operable with the resilient inner closure member 22 via the plurality of successive connectors 37.** It appears that the dissection is made to regard the distal end portion alone of the Murayama pull tab 35 as being the new modified Hicks pull device 30.

Not only would such a dissection be improper since references are to be considered in their whole, but also such a dissection would render inoperable the stated purpose of opening the closure cap because the **linear proximal portion of the pull tab 35 or 49 must be connected with the annular strip 36 to open the closure cap.**

Thus, no motivation exists for either such a dissection or for the attempted combination of Hicks with Murayama due to such inoperability. Indeed, such an attempted dissection would necessarily be based upon hindsight gained from Applicant's inventive disclosure.

The Advisory Action does not comment on the above distinction.

Finally, even the "dissected distal end portion" of the pull tab 35 does not form a semicircular member. **The distal end portion is an abbreviated flared free end of the pull tab 35, not a semicircular member. The mildly acruate contour depicted does not have sufficient arc.**

The Advisory Action does not comment on the above distinction.

Likewise dissecting out the distal ring portion of Murayama's pull tab 49 for incorporation into the Hicks tab 30 would require modification be configured as a semicircular member as disclosed in independent claims 1 and 32. A ring shape forms a continuous form with no ends. In contrast, the semicircular member disclosed in independent claims 1 and 32 has *first and second terminal ends*, the second end being remotely located from the first end.

The Advisory Action does not comment on the above distinction.

### **Hicks and Murayama Are Not Properly Combinable.**

The Hicks and Murayuma references are improperly combined and applied for at least three reasons.

First, a prior patent must be considered in its entirety, i.e., as a whole, including portions that would lead away from the invention in suit. W.L. Gore & Associates, Inc. v. Garlock, Inc., 721 F.2d 1540, 1550, 220 USPQ 303, 313 (Fed.Cir.1983), cert. denied, 469 U.S. 851, 105 S.Ct. 172, 83 L.Ed.2d 107 (1984). The Court of Appeals for the Federal Circuit in the case of Panduit Corp. v. Dennison Mfg. Co., 810 F.2d 1561, 1568, 1574, 1 USPQ2d 1593 (Fed.Cir.), cert. denied, 481 U.S. 1052 (1987) stated that it is error to "focus on isolated minutiae in a prior art



patent while disregarding its scope, i.e. its entire disclosure, and how its disclosed structure works".

Second, it is the claimed invention as a whole that must be obvious to a person of ordinary skill in the art under the §103 inquiry. The mandate of §103 is that "the invention as a whole must be considered....[This] embraces the structure, its properties, and the problem it solves." In re Wright, 848 F.2d 1216, 1219, 6 USPQ2d 1959 (Fed.Cir.1988); Diversitech Corp. v. Century Steps, Inc., 850 F.2d 675, 678-79, 7 USPQ2d 1315 (Fed.Cir.1988).

Third, to render an Applicant's invention obvious, there must exist a motivation or reason for the worker in the art, without the benefit of Applicant's specification, to make the necessary changes in the reference cited. Modifying a reference in light of Applicant's disclosure is clearly improper. Ex parte Chicago Rawhide Manufacturing Company, 226 USPQ 438, 440 (PTAB 1984).

Additionally, there is no motivation to modify the closed ring-shaped tab 30 of Hicks to use a semicircular member. The tab 30 as disclosed by Hicks is **pulled upwardly or push downwardly** by a user with a single finger. In contrast, a gripping member having first and second terminal ends, as disclosed in claim 1, requires pulling up the gripping member with a finger and then grasping the member between at least two fingers. Hicks fails to include any motivation for configuring tab 30 in such a semicircular shape as disclosed in independent claims 1 and 32..

The Advisory Action does not comment on the above distinction.

Likewise one skilled in the art would not modify Hicks by Murayama as applied in the present Office Action. Murayama's **linear proximal portion of the pull tab 35 or 49 must be connected with the annular strip 36, and hence the plurality of successive connectors 37 and the resilient inner closure member 22, to open the closure cap.** A modification

selectively disregarding the linear proximal portion of the Murayama pull tabs 35 or 49 destroys the cap's operability to open.

The Advisory Action does not comment on the above distinction.

### **Advantages of Applicant's Claimed Invention.**

As previously discussed in several previous amendments herein, the semicircular configuration of Applicant's gripping member 69 has several advantages over prior pull rings and pull tabs. Such advantages nullify the asserted conclusion of obviousness. Again, the Advisory Action does not comment on such advantages.

Gripping member 69 is specifically adapted to facilitate a user in gripping and pulling gripping member 69 when removing frangible membrane 63 from fitment 32. *See, e.g.*, present application, paragraph no. 55. For example, gripping member 69 is flexible and allows the user to straighten semicircular segment 70 to some degree allowing the segment to better conform to the contour of the user's finger. *See* present application, paragraph no. 60. Such a configuration is particularly useful in the case of smaller fitments (e.g., 28 mm and smaller fitments), particularly when the gripping member is located within the spout of the fitment. Indeed, **Murayama more particularly relates to "wide-mouthed containers"** (Column 1 lines 7-11).

With such smaller fitments, the spout opening of the fitment is small and the pull tab or pull ring must be even smaller. In the case of a pull tab, the tab must be sufficiently narrow to allow one to insert one's finger into the spout, around and under the tab. In the case of a pull ring, the outer diameter of the pull ring is smaller than the inner diameter of the spout, and the inner diameter of the pull ring is smaller still. Accordingly, it may be difficult for a user, particularly a user with larger fingers, to insert their fingers through the pull ring of a smaller fitment.

Furthermore, in the manufacturing process, a closed ring or tab as disclosed by Hicks requires a significantly more complex molding design. A flexible semicircular/free end

configuration of gripping member 69 may simplify the manufacturing process by providing a shape that more readily de-molds. *See*, e.g., present application, paragraph no. 65. For example, the semicircular configuration of gripping member 64 breaks open the loop of conventional pull rings and allows the gripping member to bend and flex out of the way as mold tooling retracts. The forces involved as the gripping member of the present invention flexes and snakes its way out of a mold cavity is likely to be substantially less than the compressive and/or expansion forces involved in demolding a fitment having a closed ring as tooling is removed from the closed ring and/or vice versa. In the case of demolding a closed ring, the higher compressive and/or expansion forces involved may in some cases be sufficient to damage the frangible membrane.

In addition, of particular importance in this application, the configuration of the semicircular member disclosed in independent claims claims 1 and 32 maximizes clearance of a finger inserted inside the inner diameter of the spout. Although a ring shape as taught by Hicks aids in pulling the member, a ring shape also limits the space between the inner diameter of the spout opening and the gripping member. Thus, a user can more easily reach into the spout opening and grasp the gripping member.

### **Allowable Subject Matter**

The Examiner has previously indicated that claims 15-23 are allowable.

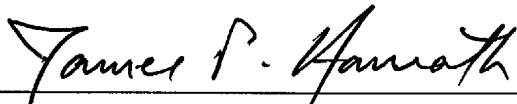
### **Conclusion.**

For at least the foregoing reasons, Applicant respectfully submits that the Hicks and Murayama patents, taken individually or combined with each other or with the Wise et al. and Guglielmini et. al. patents, do not render obvious independent claims 1 or 32. Hence all remaining pending claims are believed allowable due to their direct or indirect dependency on such independent claims.

Additionally, the Wise and Guglielmini patents, which both fail to teach the semicircular member of independent claims 1 and 32, do not make up for the foregoing deficiencies of the Hicks and Murayama patents. The Wise patent teaches away from Applicant's open semicircular gripping member in that pull out tab 68 is a flat tab. The Guglielmini patent also teaches away from such a configuration in that pulling ring 12 is a closed ring, as evidenced by the cross-hatching in FIGS. 2 and 4

All of the stated grounds of objection and rejection have been properly traversed, accommodated, or rendered moot. Applicant respectfully requests that the Examiner reconsider all presently outstanding objections and rejections and that they be withdrawn. It is submitted that the application is now in condition for allowance and an early and favorable action to that end is requested. If any questions or issues remain, the resolution of which the Examiner feels would be advanced by a telephonic conference with Applicant's attorney, she is invited to contact the undersigned at the telephone number noted below.

Respectfully submitted,

  
James P. Hanrath, Reg. No. 31,965

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James P. Hanrath  
Much Shelist Freed Denenberg Ament & Rubenstein, P.C.  
191 N. Wacker Drive, Suite 1800  
Chicago, Illinois 60606-1615  
phone: (312) 521-2760  
fax: (312) 521-2860  
e-mail: jhanrath@muchshelist.com